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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1259

86

UNITED STATES OF AMERICA,

Appellant,

—v.—

THIRD NATIONAL BANK IN NASHVILLE, NASHVILLE
BANK AND TRUST COMPANY and WILLIAM B. CAMP,
COMPTROLLER OF THE CURRENCY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE

**MOTION TO AFFIRM OF APPELLEES THIRD
NATIONAL BANK IN NASHVILLE AND NASH-
VILLE BANK AND TRUST COMPANY**

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Appellees Third National Bank in Nashville and Nashville Bank and Trust Company, pursuant to Rule 16 of the Rules of this Court, move that the judgment of the District Court be affirmed on the ground that the sole question raised and properly presented on the record is so clearly lacking in substance as not to warrant further briefing and oral argument.

QUESTION PRESENTED

The only question presented and necessary to decision on the present record is the following:

Whether there is substantial evidence supporting the District Court's finding, based on its alternative indepen-

dent examination of the record, that the service to, and meeting of the convenience and needs of, the community resulting from the merger of Nashville Bank and Trust Company, a "floundering" and "stagnant" institution, into Third National Bank in Nashville, clearly outweighed any anticompetitive effects of that merger.

STATEMENT

General.—This case was one of the three bank merger antitrust cases pending in the Federal district courts at the time of the passage of the Bank Merger Act of 1966 (80 Stat. 7), which were not immunized against charges of violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act¹ by that legislation.² This case involves a challenge to the merger of Nashville Bank and Trust Company ("Trust Co."), a small bank in Davidson County, Tennessee (the metropolitan Nashville area), into Third National Bank in Nashville ("Third National"), a larger institution. Under the 1966 legislation, this case was tried after the passage of the Act in 1966 under the substantive standards of the new Act but without the special procedural devices established by that Act—the automatic stay

¹ The Complaint attacked this merger both under Section 7 and under Section 1. The Government has abandoned its Section 1 contentions on appeal. J.S. 2 n. 1.

² The 1966 legislation immunized from attack under Section 7 of the Clayton Act and Section 1 of the Sherman Act those mergers which had been consummated prior to the date of this Court's decision in *United States v. Philadelphia National Bank*, 374 U. S. 321, June 17, 1963. § 2(a), 80 Stat. 9. Also similarly immunized were mergers consummated before the date of the Act where no Government suit had been brought to challenge them. § 2(b). The other cases in the same category as this case, in terms of their procedural status under the 1966 legislation, are: *United States v. Crocker-Anglo National Bank*, Civ. No. 41808, N.D. Cal.; *United States v. Mercantile Trust Co., N.A.*, Civ. No. 65(c) 241(1), E.D. Mo.

order and the prohibition of suits against consummated mergers—which were designed to prevent the consequence of the “unscrambling” of banks, against which Congress had expressed its policy in the Act.³ See *United States v. First City National Bank of Houston*, decided March 27, 1967, slip opinion, pp. 9-10. In this case, the merger of the two banks had taken place on August 18, 1964, subsequent to this Court’s decision in the *Philadelphia* case, but prior to the 1966 legislation.

After a protracted trial, lasting six weeks and involving the evidence of 47 witnesses, all but one of whom testified in open court, the taking of 3800 pages of transcript of testimony, and the submission of over 600 exhibits, the District Court for the Middle District of Tennessee on November 22, 1966 filed a lengthy opinion, noting that the court would shortly also enter “detailed findings of fact and conclusions of law to implement and supplement this opinion.” (Opinion, J.S. 54) On December 16, 1966, the District Court entered its Judgment, dismissing the Complaint. (J.S. 124) The Judgment recited that the Opinion and the Findings of Fact and Conclusions of Law “shall be taken and considered together as constituting the Court’s findings of fact and conclusions of law in this action.” Accompanying the Judgment were lengthy and detailed findings of fact, amounting to 302 in all, and 12 conclusions of law. (J.S. 55-123)

The Decision of the District Court.—The case was, of course, tried and decided before this Court’s decision in

³ See amended § 18(c) of the FDIC Act, 12 U.S.C. § 1828(c) (7)(A) and (C). The caption to the 1966 legislation makes it plain that one of its purposes is: “to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks”

United States v. First City National Bank of Houston, at a time when the law was still unsettled as to the relationship between the administrative findings of the federal regulatory authority with jurisdiction to approve or disapprove a bank merger (here, the Comptroller of the Currency) and the role of a Federal district court in a subsequent antitrust suit attacking the merger. Accordingly, on the material points in controversy, the District Court applied alternative review standards, both affirming the conclusions of the Comptroller as supported by substantial evidence,⁴ and entering its own findings with respect thereto on the basis of an examination *de novo*. On each material point, the District Court and the Comptroller reached the same conclusion.

The District Court ruled alternatively—on both the “substantial evidence” basis and on its *de novo* examination—as to two questions: (1) whether, apart from the “convenience and needs” clause of the Bank Merger Act of 1966 the merger would have been unlawful—that is, whether its effect “in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade”; and (2) the “convenience and needs”

⁴ While the Comptroller had not formally made findings of the nature specified in the 1966 legislation, his approval of the merger having occurred prior to that legislation, the District Court received the Comptroller's written expressions, as a party to the action, and his testimony in open court on direct and cross-examination at the trial of the action—which expressions and testimony were in the terms provided for in the 1966 amendment—as tantamount to administrative findings. Since the legislation itself does not require formal findings by the Comptroller after a hearing in the customary sense (see *United States v. First City National Bank of Houston*, *supra*, slip opinion, p. 7), this approach of the District Court appears to be both practical and clearly correct. It has not been challenged on this appeal.

exception—that is, on the question whether “the competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.”⁵ Section 18(c)(5)(B) of the FDIC Act, as amended by the 1966 Act, 12 U.S.C. § 1828 (c)(5)(B).

Thus, on the question of violation of the competitive standard, the court ruled that “the Comptroller of the Currency’s findings . . . that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record.” (Opinion, J.S. 53) The court stated that it was “also of this view independently of the Comptroller’s findings.” (Opinion, J.S. 53)

Next, the court, also in the alternative, first, ruled that the Comptroller’s findings as to the outweighing of the anticompetitive effects of the “convenience and needs of the community” were supported by the record,⁶ and, sec-

⁵ For ease of reference hereafter we will sometimes refer to the question whether the merger violates the standard of the first clause we have quoted as the question of the “violation of the competitive standard” and that standard as the “competitive standard,” and will refer to the exception in the quoted clause which will save the merger from illegality, even where a violation of the competitive standard is shown, as the “convenience and needs” test or exception.

⁶ The Government makes certain references to the fact that the Federal Reserve Board, the FDIC, and the Antitrust Division rendered unfavorable reports on the merger. (J.S. 4) But of course, under both the 1960 and 1966 Bank Merger Acts, these advisory reports were confined to the single point of the anticompetitive effects of the merger. It was only the Comptroller, and, at the trial of the case, the District Court, who were charged under the 1966 Act with the duty of examining all the factors and coming to an overall judgment on both the competitive factor and the community convenience and needs, as demanded by the statute.

ond, made such a finding as its own judgment. Thus, the Court not only concluded (C.L. 12, J.S. 123) that the Comptroller's findings on the "convenience and needs" exception were supported by the record, it made independent findings on the issue itself.

With rare exceptions,⁷ the District Court's extensive findings relevant to the convenience and needs factor are couched in terms of its own independent findings of fact, not in terms of whether the Comptroller's views were supportable. The District Court, on the basis of a host of subsidiary findings, reached the following conclusion as to the condition of Trust Co. immediately before the merger:

"The Trust Company had simply reached a period of imminent deterioration. It was at the time of the merger a 'floundering' bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian Age which gave it

⁷ These exceptions are Fdg. 201 (J.S. 98), Fdgs. 293-94 (J.S. 114), and Fdgs. 296-302 (J.S. 115-21). It is interesting to note that even as to its upholding of the Comptroller's findings, the District Court ruled not simply that the findings were supported by substantial evidence but that they were supported by the preponderance of the evidence introduced in the trial of the action in court. See, e.g., Fdg. 302, J.S. 121; C.L. 12, J.S. 123. This emphasizes the District Court's own independent finding, on the preponderance of the evidence before it, respecting the matters in issue. Congressman Patman's views in the legislative history of the Act were to the effect that a district court's findings, particularly on the convenience and needs issue, were to be made on the basis of "the preponderance of the evidence" introduced in the action. 112 Cong. Rec. (daily ed.) 2333-34, as quoted in *United States v. First City National Bank of Houston*, *supra*, slip opinion, p. 5.

birth than to the competitive realities of 20th Century commercial banking." (Opinion, J.S. 53-54)

On the basis of this and its other findings, the District Court independently made the following ultimate finding:

"As shown by the *decided preponderance of the evidence*, the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger." (Fdg. 195, J.S. 96) (emphasis supplied)

And the District Court, alternatively to its Conclusion of Law No. 12 (J.S. 123) that the Comptroller's decision on the outweighing of the anticompetitive effects by the convenience and needs of the community was supportable on the record, itself concluded: "The anticompetitive effects of the merger of Third National Bank and Nashville Bank and Trust Company are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Nashville metropolitan area (Davidson County, Tennessee)." (C.L. 11, J.S. 123)

The District Court fully reviewed all the relevant facts on the question of the anticompetitive effect of the merger. It considered the market percentages and statistics as to market concentration urged by the Government. The District Court, in passing on the question whether the merger,

* The merging banks here undertook and bore the burden of showing that the convenience and needs of the community outweighed the competitive effect, as required by this Court's decision in *United States v. First City National Bank of Houston*, *supra*.

considered without regard to its effects upon the community convenience and needs, would have violated the competitive standard, made certain observations to the effect that under the 1966 legislation the intent of Congress was that principles similar to those enunciated by this Court in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), should be followed.⁹ Whether or not these observations are correct, they are controversial; but the fact of the matter is that neither the correctness of these observations—nor, indeed, the District Court's conclusion on the question of violation of the competitive standard—is a necessary element in the judgment under review.

This is because the District Court also found that, in fact, the anticompetitive effects of the merger were outweighed by the "convenience and needs of the community." The District Court took all the relevant facts bearing on competition into account in making a factual balancing of the convenience and needs of the community to be served by the merger against the anticompetitive effects of the merger. On this basis, the District Court's finding that the anticompetitive effects were outweighed is in itself an adequate basis for its judgment; and since this Motion to Affirm is primarily based on that finding, we review the District Court's subsidiary findings relating to it. These findings, relevant to the issues of community convenience and necessity, are lengthy, and virtually all of them were entered as the court's own independent findings.

The Findings on the Convenience and Needs Issue.—These findings of the court revealed the following picture with respect to Trust Co.

⁹ We will, if probable jurisdiction is noted, argue that these observations are entirely sound in the context in which they were made. See n. 14, p. 19, *infra*.

Trust Co. was originally purely a trust institution. It was only in comparatively recent years that commercial banking activities were at all emphasized, and indeed it was not until 1956 that the institution's name was changed from The Nashville Trust Co. to reflect its banking operations. (Fdgs. 10-11, J.S. 58) At a call date immediately prior to the merger, Trust Co.'s capital structure was only approximately \$4,360,000. (Fdg. 10, J.S. 58)

In 1956, Mr. W. S. Hackworth, a popular and well-connected man of 60 with a successful career as a railroad executive already behind him, became president of Trust Co. (Fdg. 115, J.S. 80) In the late 1950's, under Mr. Hackworth's direction, Trust Co. expanded its commercial banking business, primarily "due to the formidable influence and personal business connections" of Hackworth and of H. G. Hill, Jr., the Chairman of the Board and controlling stockholder of the bank, who also headed a grocery chain prominent in the area. (Opinion, J.S. 44-45) However, by the 1960's, the commercial business which Hackworth's and Hill's contacts could bring in had been substantially exhausted (Opinion, J.S. 45; Fdg. 233, J.S. 103), and Trust Co. had reached a "plateau" on which it was "stagnant and floundering." (Fdg. 134, J.S. 84-85) Thus, in the four years from June 30, 1960 to June 30, 1964 (immediately prior to the merger) the participation of Trust Co. in the total banking business in the Nashville area declined from 5.72% to 4.83%, a decline of well over 15%. (Fdg. 134, J.S. 84-85) Although the community's growth rate increased, as did that of the other Nashville banks in the 1960-64 period, Trust Co.'s rate of growth declined substantially in that period. (Fdgs. 225-29, J.S. 102) Demand IPC deposits absolutely declined for Trust Co., contrary to the experience of any other Nashville bank. (Fdgs. 230-32, J.S. 103)

It was in this period—the early 1960's—that the basic deficiencies of Trust Co. became sorely manifest. By 1964, Hackworth was 68 years of age, and under daily medical attention for an illness which subsequently caused his death. (Fdg. 129, J.S. 83). Superannuation was evident generally in the Board of Directors and departmental heads of Trust Co.; 9 of 13 directors were 65 or older, as were 4 of the 6 departmental heads. Apart from the trust department, the average age of the officers was over 60. (Fdgs. 140, 141, 143, J.S. 85-86) The salary level at Trust Co. was lower than the average salary at the three major banks in Nashville and, indeed, was lower than that at the four small banks in the county. (Fdg. 138, J.S. 85)

By the 1960's, a severe deterioration in Trust Co.'s loan portfolio had set in. By the 1962 examination, the ratio of "classified loan" (substandard, doubtful, and loss loans) to capital structure exceeded 20% (a common bench mark of the regulatory authorities). (Fdg. 173, J.S. 92) The average rate of classified loans to all loans of all national banks in Tennessee on the examination closest to the date of the merger was 1.43%; Trust Co.'s ratio of classified loans to all loans was, at 6.9%, almost five times this average.¹⁰ (Fdg. 271, J.S. 110) Trust Co.'s officers were not properly servicing their loans. (Fdg. 173, J.S. 92) The ratio of loan losses was 5.6% immediately prior to the merger (as compared, for example, with Third National's ratio of 1.6%). (Fdg. 174, J.S. 92-93) Trust Co. had no credit department and, as the District Court found, such a department is necessary to operate a competitive commercial bank. (Fdg. 175, J.S. 93) Trust Co. had no credit specialists. (Opinion, J.S. 46) Indeed, Trust Co. did not even keep credit files. (Fdg. 111, J.S. 79-80)

¹⁰ Third National's was 0.6%. (Fdg. 271, J.S. 110)

Indeed, as the District Court found, the heart of the commercial banking business is commercial lending and commercial lending is the reason for the existence of commercial banks. (Fdgs. 283, 286, J.S. 112, 113) Despite this, Trust Co.'s commercial banking department operated more as a sideline. Obvious prospects for commercial banking services were unaware that Trust Co. was even engaged in commercial lending. (Fdg. 286, J.S. 113) Not only did Trust Co. have a comparatively low ratio of loans to deposits, but about 40% of its loans were tied up in long-term mortgages, instead of being devoted to commercial lending. (Fdg. 287, J.S. 113; Fdg. 109, J.S. 79)

Trust Co. was also deficient in a number of other material respects. It was not equipped to make indirect auto loans through dealers, and was thus limited to the making of direct loans. (Fdg. 111, J.S. 79-80; Fdg. 241, J.S. 104; Fdg. 253, J.S. 107) Trust Co. was incapable of doing an effective job at correspondent banking (Fdg. 95, J.S. 77), and it did not really have a correspondent bank department as such. (*Ibid.*) Thus, it could not perform the services for banks, and indirectly for their customers, throughout the less urbanized areas of the central South that the larger banks in Nashville—together with their competitors from Memphis, Birmingham, Knoxville, Chattanooga, Louisville, New Orleans and St. Louis—could perform. (Fdgs. 95, 99, J.S. 77) As the District Court found, "The Nashville market is such that the failure of a bank located in the area to engage in correspondent banking demonstrates a lack of determination to do its job." (Fdg. 101, J.S. 78) As the District Court observed, "A failure to compete in this area places a bank at a distinct disadvantage." (Fdg. 101, J.S. 78; see also Fdg. 102, J.S. 78) Banks of Trust Co.'s size in its general area could, as a

practical matter, if they had the management skills, engage satisfactorily in correspondent banking. (Fdg. 104, J.S. 78)

One of the greatest handicaps of Trust Co. was its lack of branch banking facilities. It had only one small branch. Smaller banks passed it by in this respect. (Opinion, J.S. 47) By the time the merger was pending before the Comptroller, there were difficulties in Trust Co.'s catching up through the establishment of branch banks. (Fdg. 182, J.S. 93-94) The District Court also found that Trust Co. was deficient in such areas, related to the attraction of consumer deposits, as special checking account facilities and the provision of mobile home financing. (Fdg. 111, J.S. 79-80) Moreover, bookkeeping and accounting procedures were inadequate and obsolete and physical plant was wearing out. (Fdgs. 179-80, J.S. 93)

Trust Co.'s system of internal controls was weak. It had very little of a continuous audit program. Such a program is essential when a bank reaches Trust Co.'s size, and all national banks in the region of comparable size had such programs. (Fdg. 93, J.S. 76) Indeed, in the late stages, controls over the trust department, the oldest and most established facility of Trust Co., were breaking down. The 1962 FDIC report noted that the vice president in charge of the trust department was remiss in improving functional procedures necessary for prudent operation. He was criticized for exercising little control over junior officers. Necessary reforms promised the examiners were not carried out. (Fdg. 154, J.S. 88) On certain occasions, Trust Co. as trustee acquiesced in violations of law, and the trust department's ability to make corrections in response to examination criticism was disappointing. (Fdgs. 158-60, J.S. 89-90)

In summary, in the last four years of its separate operation, the basic structural and organizational problems of Trust Co. had caught up with it. Its president "had about exhausted the area from which he could obtain business." (Fdg. 233, J.S. 103) His active business life was coming to a close. He had come "very close to being an indispensable person" to Trust Co. (Fdg. 115, J.S. 81), and his passage from the scene was imminent. Meanwhile Trust Co. was not growing apace with the Nashville economy. During the four years immediately prior to the merger, its growth rate had decreased 55%; every other Nashville bank showed an increase. (Fdg. 225, J.S. 102)

Not only did the District Court make its ultimate findings as to the condition of Trust Co. on the basis of these extensive subsidiary findings, it also gave specific attention to the precise test of the statute, which is not whether the acquired bank fits in some colloquial category such as "floundering," but whether, on all of the proofs, the probable effect of such a bank's merger in meeting the convenience and needs of the community to be served clearly outweighs the anticompetitive effects. In reaching an affirmative conclusion on this subject the District Court's findings endorsed the decision of the Weaver group—which had contracted to purchase the controlling block of stock in Trust Co. from the Hill enterprises early in 1964—that revitalization of the bank without merger was not feasible. (Opinion, J.S. 47-48) At the time of the sale to the Weaver group, and prior to the merger with Third National, raiding attempts on customers and key employees by the larger competitors of Trust Co. took place, and the morale of Trust Co. employees was adversely affected. (Fdg. 127, J.S. 83) The Hill interests had sold out, and 30% of the deposits had been attributable to them, (Fdg. 116, J.S. 81)

During this period of uncertainty, Mr. Primm, one of the senior officers of Trust Co. and its only officer who devoted his time primarily to solicitation of commercial accounts, was hired away by one of the large competitors of Trust Co., taking very substantial deposits and loan accounts with him to his new connection. (Fdg. 126, J.S. 82-83) Key directors resigned. (Fdgs. 128, 131, J.S. 83-84) Trust Co. was a "sitting duck" for other banks. (Fdg. 194, J.S. 95-96) The problems were "almost insoluble . . . unless resort was had to a merger." (Fdg. 131, J.S. 84)

When the Weaver group acquired control, they became acquainted with the facts as to Trust Co.'s condition and encountered all its manifold problems whose seriousness they had not previously recognized. (Fdg. 182, J.S. 93-94) After many inquiries and efforts to find improved management or otherwise solve these problems, the Weaver group decided that merger was the best method of fulfilling their responsibilities as the controlling stockholders of the bank; that in fact, a merger was a business necessity. (Fdgs. 183-84, J.S. 94)

As to the overall effects of the merger upon the convenience and needs of the Nashville community, the District Court found that the need for capital in the Southern region and in the Nashville community is great, and that the region must be an importer of capital for a long time, its economy needing larger financial institutions to support its growth potential. (Fdg. 68-72, J.S. 71-72) The lower lending limits of the Nashville banks cause home industries in the area to seek their credit elsewhere. (Fdg. 73, J.S. 72) In the absence of larger financial institutions, the whole region of Tennessee, northern Alabama, and southern Kentucky is a capital deficit area, and the inadequacies of local financial institutions in the area cause

an inability on their part to act as lead or primary sources for credit. (Fdg. 202-06, 210, J.S. 98-99) The merger strengthened Third National and increased its loan limit. (Fdg. 113, J.S. 80)

Cities in the southeastern United States comparable in size and population to Nashville have accordingly tended to have similar or greater concentrations in commercial banking. Thus, taking the deposits of the three largest banks in each metropolitan area, in Chattanooga there is a 100% concentration; in Mobile, 98%; in Birmingham, 93%; and in Memphis, 92%. (Fdg. 83, J.S. 74; Opinion, J.S. 50)

Reviewing all the factors, the court concluded that the merger's anticompetitive effect was clearly outweighed by the affirmative benefits to the convenience and needs of the community afforded by the merger. (J.S. 51-52; 53; Fdg. 195, J.S. 96; C.L. 11, J.S. 123) As a further elaboration of this finding, the court reviewed the postmerger evidence to show the extensive improved service to the convenience and needs of the Davidson County area actually brought about through the merged operation. (Fdgs. 196-97, J.S. 96-97)¹¹ It found that the relative size of Third National on October 1, 1964, was temporary, that during 1965 Third National's share of the market declined (Fdg. 67, J.S. 71; Fdg. 87, J.S. 75), and that at the end of 1965, one of Third National's competitors remained as the largest bank in Davidson County. (Fdg. 67, J.S. 71)

¹¹ This is, of course, one of the rare cases where there ever will be any postmerger evidence on the actual effects of a bank merger upon competition and upon the community convenience and needs, since the automatic stay order provision of the 1966 Act will in the future prevent mergers from being consummated pending an antitrust attack.

ARGUMENT

The questions which the Government seeks to tender to this Court are not necessary to decision on the present record and on the findings of the District Court. This case amounts to nothing more than an attempt by the Government to use the direct appeal provisions of the Expediting Act to retry the facts, found on the basis of substantial evidence by the District Court, in what is essentially a routine case. *Cf. United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 n. 1 (1963). No resolution of any unresolved substantial question of law is necessary to an affirmance of the District Court's judgment, and the material and essential findings of the District Court are supported by substantial evidence. Moreover, the "abhorrence" of Congress for unscrambling a consummated bank merger militates against reaching for the issues which the Government seeks to tender; and is a further factor indicating that the judgment should be summarily affirmed on the basis of the District Court's well-supported findings.

1. *The District Court made findings on the material issues in the case on the basis of the proper standard of de novo review of the Comptroller's ruling.*—The Government's first basis for seeking to bring this case before this Court in plenary fashion is its assertion that the District Court did not make a "review *de novo*" of "the issues presented," as required by the Bank Merger Act of 1966, and as taught by this Court's opinion in *United States v. First City National Bank of Houston*, *supra*, slip opinion, pp. 5-8, but that it simply applied a "substantial evidence" review test. (J.S. 11-12)

But the District Court's voluminous findings of fact and conclusions of law bear ample witness to the effect that

(at least alternatively to a "substantial evidence" review) the court made a *de novo* investigation of the issues and made its own findings *de novo*. As we have set forth in the Statement, pp. 4-7, *supra*, the alternative nature of the ultimate findings of the District Court on both the competitive standard issue and the convenience and needs issue is plain. See J.S. 53; Fdg. 195, J.S. 96; and compare C.L. 11 with C.L. 12, J.S. 123.

Thus, on the question of violation of the competitive standard, the court concluded that, as to the absence of a violation, it was "also of this view independently of the Comptroller's findings." (J.S. 53) —And as to the convenience and needs exception, the court likewise made alternative findings on the basis of a conventional review and on the basis of an independent examination. C.L. 11, 12, J.S. 123. The ultimate finding of fact was the District Court's own finding; the judgment was "the court's judgment."¹² The finding was that:

"As shown by the decided preponderance of the evidence, the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger." (Fdg. 195, J.S. 96)

The District Court's subsidiary findings cover 76 printed pages. (J.S. 55-121) With rare exceptions (see p. 6, n. 7, *supra*), these are all stated as the District Court's own findings, and are made in the same way as any findings of fact in a civil action tried without a jury would be made.

¹² *United States v. First City National Bank of Houston*, *supra*, slip opinion, p. 7.

In the light of these voluminous *de novo* findings by the District Court, we submit that it is impossible to reach any conclusion other than that, along with its holdings that the Comptroller's rulings were supportable on the record, the court also ruled on the substantive issues as a matter of its own judgment. Although the court's opinion, rendered prior to this Court's decision in *United States v. First City National Bank of Houston*, indicates a preference, with respect to the convenience and needs issue, for the conventional administrative review standard (Opinion, J.S. 32), it is completely clear from the court's findings and conclusions that—as indeed the dictates of sound judicial administration at the time required—it also, on an alternative basis, reached and expressed its own judgment. Certainly there is no basis for this Court's assuming plenary jurisdiction in this case simply to revise the expressions in the District Court's opinion as to the preferable standard of review, since the issue of the standard to be applied has been put to rest by the *Houston* decision.¹³

2. *Whether or not the District Court's ruling as to the issue of violation of the competitive standard is correct, the District Court properly found, on ample evidence, that the convenience and needs exception was made out, and*

¹³ We must confess to some perplexity at the Government's suggestion (J.S. 12-14) that even though, in its contention, the District Court applied the wrong review standard, this Court should go beyond a simple reversal with directions to make new findings applying a proper review standard. Clearly, if the Government were right in its contention that the wrong review standard was applied, this case would not be ripe for plenary review of the other issues on the merits. The Government's position thus confirms, at the same time: (a) the lack of merit in its contention that the sole standard applied by the District Court was the conventional administrative review standard, and (b) its obvious desire to foist upon this Court broad issues of law which are not necessary to decision on this record.

this is a complete support for its judgment.—The Government next urges that this case be taken for plenary review to pass on the substantive standard to be applied in determining whether a bank merger violates the competitive standard of the 1966 Act. (J.S. 14-19) In this respect also, the Government's Jurisdictional Statement forgets the salutary principle that "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). We recognize that, if they were necessary to its judgment, certain observations in the District Court's opinion to the effect that the Bank Merger Act of 1966 reinstated, with respect to the issue of violation of the competitive standard, the "rule of reason" approach to mergers enunciated in *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948), would present an important question indicating the desirability of plenary review by this Court.¹⁴ But the District Court's judgment

¹⁴ Of course, should the Court note probable jurisdiction, we would propose to argue in support of the District Court's ruling on the question of the competitive standard.

1. In the first place, on the present record, even under the opinion of this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) the merger did not violate the competitive standard. As this Court envisioned in *Philadelphia*, this was a case of a merger in which there was "evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S., at 363. On the basis of ample evidence, including the admissions of two of the Government's own witnesses (Tr. 812, 924), the District Court concluded that "competition in Nashville between commercial banks has increased significantly since the merger" (Fdg. 291; J.S. 114), and that the merger "was procompetitive in its effect." (C.L. 10, J.S. 125)

2. Moreover, the District Court's observations as to the *Columbia Steel*, 334 U.S. 495 (1948) case are quite apposite. The overall determination that must be made—balancing the anticompetitive effects against the benefits to the community—is essentially a "rule of reason" approach. This Court recognized it as such in its opinion in *United States v. First City National Bank of Houston*,

does not depend upon the correctness of these observations. The District Court's judgment remains supported by its independent conclusion that the convenience and needs of the community clearly outweighed such anticompetitive effects as the record showed.

(a) There is no merit to the Government's argument (J.S. 19) that if the District Court erred as to the question whether the merger would have violated the antitrust laws apart from the convenience and needs exception, its judgment is "fatally flawed" and must be reversed. There is no question but that in evaluating the anticompetitive impact of the merger, and balancing against it the convenience and needs factor, the District Court took into account the statistical information, stressing market percentages, which the Government urges (J.S. 14) as the touchstone of the question of violation of the competitive standard. See Opinion, J.S. 40-43; Fdg. 19, J.S. 60; Fdgs. 20-54, J.S. 60-67 (market definition); Fdg. 66, J.S. 70-71; Fdg. 212,

slip opinion, p. 7. As the Court there observed, "the 'rule of reason', long prevalent in the antitrust field (see, *e.g.*, *Chicago Board of Trade v. United States*, 246 U.S. 231)" was to be applied by reason of the balancing test imported by the 1966 legislation. Certainly the approach of *Columbia Steel* to mergers is essentially a "rule of reason" approach. Thus, the point of the District Court's citation of that case's rule was the undeniable proposition that under the 1966 legislation the community convenience and needs had to be balanced against the anticompetitive effect. As the District Court observed: "Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry." (Opinion, J.S. 35)

Indeed, under the balancing test of the 1966 legislation, Congress made express provision that mergers which had previously been judicially halted might be resubmitted for administrative and judicial consideration in the light of the standards of the new Act. § 3, 80 Stat. 9.

J.S. 99; Fdgs. 217-19, J.S. 100-01.¹⁵ So long as the District Court took all the relevant facts bearing on competition into account in making a factual balancing of the convenience and needs of the community against the anticompetitive effects, it is clearly without significance whether or not the District Court drew the unnecessary further legal conclusion that, apart from the convenience and needs exception, the merger would have violated the Act. *Cf. Seaboard Air Line R. Co. v. United States*, 382 U.S. 154, 156-57 (1965).

The District Court's opinion makes it quite plain that the District Court realized that purely under the competitive test of Section 7 of the Clayton Act—which the Government contends is identical with the test to be applied under the competitive standard clause of the 1966 legislation—there might well have been a violation. (Opinion, J.S. 40-43). But even with this quantum of an anti-competitive effect, which the District Court recognized, it held that the favorable effects on the convenience and needs of the community outweighed that effect. On this basis, the Government's position that this Court should assume plenary jurisdiction over this case simply to instruct the District Court that the Section 7 standard is applicable under the competitive standard clause of the 1966 Act is an exercise in sterile formalism.

(b) The Government's final point is an attack on certain aspects of the District Court's finding that the convenience

¹⁵ The District Court, of course, went beyond the market percentages to look at the realities of the competitive situation "on the basis of . . . an individual examination" of Trust Co. (H.R. Rep. No. 1221, 89th Cong., 2d Sess. (1966), p. 3), and in a number of findings indicated its conclusion that even as to the competitive factor the percentages in this case did not tell the whole story. See, e.g., Fdgs. 247-49, J.S. 106; Fdgs. 283-84, J.S. 112.

and needs exception was proved in this case. While, at least for purposes of this Court's assumption of jurisdiction, the Government does not challenge the finding that Trust Co. was a "floundering" and "stagnant" bank (J.S. 21 n. 12), it does claim that the possibility that Trust Co. might have been rehabilitated without merger, or that it might have been merged with one of the other large banks in Nashville, militates against the District Court's conclusion that the convenience and needs of the community clearly outweigh the anticompetitive effect. (J.S. 19-23)

In the first place, as the Government seems to admit by presenting the question as a substantial one, it is far from clear whether the existence of alternative purchasers would in any event militate against a district court's conclusion under the 1966 Act that the convenience and needs of the community flowing from the merger would outweigh the anticompetitive effects. It is, on the face of the statute, as this Court has indicated, precisely this sort of balancing test that the District Court must make under the convenience and needs exception—similar to the "rule of reason" balancing test applied in some contexts under the antitrust laws. See *United States v. First City National Bank of Houston*, *supra*, slip opinion, pp. 7-8; cf. *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). Logically, a highly beneficial merger might well be held to promote community convenience and needs in such a manner as to excuse its anticompetitive effects, even though there were present other solutions, having less of an anticompetitive effect, which would have less over-all benefit to the community.

The Government's position flows essentially from false analogy to the "alternative purchaser" doctrine that is

applied with respect to the so-called "failing company defense" in orthodox Clayton Act Section 7 cases. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *International Shoe Co. v. FTC*, 280 U.S. 291, 302 (1930). But in that area the sole question is the effect on competition; the acquisition of a failing company by a competitor is deemed lawful on the basis that competition will not be impaired since the failing company would otherwise disappear as a competitive factor; if there is an alternative purchaser available, such a conclusion cannot be drawn. *International Shoe Co. v. FTC*, *supra*, at 302-03; Note, 68 Yale L.J. 1627, 1663 (1959). But this rationale affords no basis for the rewriting of the "convenience and needs" provision in the text of the Bank Merger Act, which the Government's contention amounts to.

In any event, the issue of whether an "alternative purchaser" doctrine should be recognized under the convenience and needs provision of the 1966 Act is not factually presented on this record. This is clearly not a case where there was a purchaser "other than a competitive bank . . . ready, willing, and able to acquire the bank with management problems" See Remarks of Congressman Reuss, 112 Cong. Rec. (daily ed.) 2338, quoted at J.S. 20. No such purchaser was in evidence. No offer, other than from a major Nashville bank, was made. Contrast *United States v. Diebold, Inc.*, *supra*, at 655.

The Weaver group, which had purchased control of Trust Co. from the Hill interests, was unable, as the District Court found, to remedy the bank's problems. The Government's naked assertions that the Trust Co.'s problems were "transitory" and "easily resolved"—and that the Weaver group might have remedied them quite "simply" had they tried harder and without "such haste" (J.S. 21-23)—are

pure speculations,¹⁶ which fly directly in the face of the District Court's specific findings, and take a highly incomplete view of the record. Thus, in this context, the Government claims, on the basis of an estimate made on the record, that a one-time expenditure of \$575,000 could have revitalized the bank. (J.S. 22) But the estimate in question was not of the one-time expenditure which might have done this, but was simply an estimate of the *initial* expenditure that would be required. (Tr. 1398)¹⁷ Substantially all of the \$575,000 starting-up expenditure would be annually recurring, since virtually all that expenditure related to increased salaries, additional employees, new departments, computer rental, and other expenses which could not be met simply through a one-time injection of new capital. Even in its most profitable year, all of Trust Co.'s gross income before taxes (\$567,000) would have been consumed by these expenses, leaving nothing for the increment to the bank's capital structure necessary to increase loan limits, or to make capital improvements, and, of course, leaving nothing for the payment of dividends to the investors in the bank.

¹⁶ Cf. *International Shoe Co. v. FTC*, 280 U.S. 291, 301-02 (1930): "It was suggested by the court below, and also here in argument, that instead of an outright sale, any one of several alternatives might have been adopted which would have saved the property and preserved competition; but, as it seems to us, all of these may be dismissed as lying wholly within the realm of speculation. . . . [O]ne guess is as good as the other. . . . [N]o one is wise enough to predict with any degree of certainty whether such a course [one of the speculative alternatives] would have meant ultimate recovery or final and complete collapse."

¹⁷ As the District Court found: "A merger with Third National was determined to be the best solution to the grave problems confronting the trust company at the time of the merger. Without the merger, these problems could not have been solved without *drastic expenditures over a protracted period of time.*" (Opinion, J.S. 51) (emphasis supplied)

The Government's attempt to restate the record in this fashion amply demonstrates the extent to which it is forced to go behind the District Court's findings of fact in order to suggest that there was a solution alternative to merger here, and the insubstantiality of that effort. Indeed, on this whole point, the Government seems to forget that one of the basic purposes of the 1966 legislation, as made manifest in the House Report, was to permit mergers in the case of banks "in medium to smaller sized communities" where one of the banks was "below the economic minimum size to attract capable and vigorous management personnel." H.R. Rep. No. 1221, 89th Cong., 2d Sess. (1966), p. 3. Such banks cannot be effectively rehabilitated without merger; and it was their merger that the Act was designed to permit.¹⁸ The Government's attempt to suggest that a protracted period for the painful exploration of alternatives was mandatory for Trust Co. also completely ignores the fact that the solvency of a commercial bank—more than that of any other community institution—rests on public confidence, an elusive quantity which can vanish overnight, particularly in a small or medium sized community. The Government's essential quarrel is with the decision of Congress to permit mergers under these circumstances.

Indeed, the only other alternative solution proposed by the Government is merger—merger with Commerce Union Bank, like Third National one of the "big three" banks in Nashville.¹⁹ Commerce Union did indicate a desire to merge

¹⁸ "[Trust Co.'s managerial problems] presented an almost insoluble problem to the owners of Nashville Bank and Trust Company unless resort was had to a merger." (Fdg. 131, J.S. 84; see also Fdgs. 127, 139 and 184, J.S. 83, 85, and 94)

¹⁹ Merger with a bank outside of Davidson County was not an available solution to Trust Co.'s problems. Tennessee law prohibited branching across the lines of the county, and this prevented

Trust Co. into it after its acquisition by the Weaver group. (Fdg. 120, J.S. 81) The Government's suggestion of this as a preferable alternative, we submit, indicates the total lack of substance of its contention as to alternative purchasers on the present record. For this merger would itself have combined together 26% of the banking assets, deposits, and loans in the market, and, more importantly, would have had precisely the same effect on the degree of concentration in the hands of the "big three" banks in the market—so much complained of elsewhere by the Government—as did the merger which actually took place. (Fdg. 66, J.S. 70-71) It would seem a strange rule of law to conclude that while the Weaver group was not privileged to sell out to Third National where the result was a bank with 38% of the market, it was privileged to do so to Commerce Union, at a substantially lower price, although a 26% market share and a 98% market concentration would result. Such a proposition exalts a dryly statistical approach to antitrust law to a completely untenable extent.²⁰

* * * * *

In every respect, then, the Government's Jurisdictional Statement is an attempt to induce this Court to reach for

mergers on an intercounty basis. Fdg. 20, J.S. 60; Tenn. Code Ann. § 45-211. This inhibition would also be applicable to an intercounty merger with a national bank. Rev. Stat. § 5155, as amended, 12 U.S.C. § 36.

²⁰ While there was also a finding that for many years there was a market demand for Trust Co. stock and important efforts to buy into the bank during the years preceding the merger (Fdg. 14, J.S. 59), urged by the Government (J.S. 23) as indicating an unidentified potential alternative purchaser, there is no showing that any of these attempts to acquire bank stock contemplated the acquisition of a controlling interest. The context of the finding makes it plain that all that was meant was that despite market bids, Trust Co. remained substantially a close corporation.

questions of law which are either not essential to judgment or which are not presented on the record. As we have already suggested, we do not believe that the problems necessarily inherent in the Expediting Act should be multiplied through this approach.

There are further reasons why, on this record, this Court should not, by noting probable jurisdiction, reach for the questions of law which the Government unnecessarily tenders. The usual remedy in merger cases involving consummated transactions is divestiture. See *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961). But as a case involving a consummated bank merger, this case presents an isolated instance of a situation where Congress has "abhorred" the relief of divestiture. See *United States v. First City National Bank of Houston*, *supra*, slip opinion, p. 10. This is one of three cases where suits were brought attacking bank mergers which were in process at a time too late to be excused by the forgiveness provisions of the Bank Merger Act of 1966 and too early to be affected by the automatic stay order provisions of that Act. As to mergers approved after the effective date of the Act, those provisions are designed to prevent a situation in which "the agony and the inequity" of a bank unscrambling will be presented. See *United States v. First City National Bank of Houston*, *supra*, slip opinion, pp. 8-10.

Moreover, there are particular reasons why divestiture—a remedy which has never been ordered in any litigated bank merger case—would pose special problems here. The course of the litigation has caused a public disclosure to be made of Trust Co.'s status as a stagnant, floundering bank. In the light of this, it is hard to see how an effective divestiture could be made, since interest in acquiring Trust

Co., even assuming that the mechanics of divestiture could be accomplished; will have been greatly dampened by the disclosures at the trial. Under these circumstances, the losses and inequities of a divestiture would certainly be magnified. Thus, should the judgment below be reversed and the merger ultimately found to violate the Act, the consequences would be either the bank "unscrambling" which generally Congress abhorred and which would have particular complications here, or the retention by Third National of the acquired bank, subject to some other form of relief.²¹

While, of course, we do not suggest that mergers occurring in the twilight period exemplified by this case are immunized from liability under the antitrust laws, we do suggest that the dilemma we have mentioned is a further reason militating against this Court's plenary exercise of its appellate jurisdiction here, where the legal issues tendered by the Government are not presented on the record and where the District Court's judgment is supportable as a matter of fact on certain of the alternative bases on which it proceeded.

²¹ While, to be sure, the banks opposed the Government's motion for a preliminary injunction in this case, they did so essentially on the basis that the consequences of not permitting an immediate absorption of the stagnant, floundering Trust Co. by Third National would be even more serious than the problems of an eventual divestiture. (Transcript of Hearing on Preliminary Inj., p. 139.) But the point is that Congress, in passing the 1966 legislation, made plain its view, as this Court has recognized, that in any event the process of "unscrambling" a bank is an abhorrent one.

CONCLUSION

For the reasons stated, on the basis of the District Court's alternative independent finding that the anticompetitive effects of the merger were clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served, the District Court's judgment should be affirmed. We respectfully submit that the Court may wish to consider setting forth in its order of affirmance the limited basis therefor, in view of the nonessential observations in the District Court's opinion of which the Government has complained in its Jurisdictional Statement.

Respectfully submitted,

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